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In the Supreme Court of the United States

October Term, 1983

EDWARD D. BECKER and CARRETTA TRUCKING COMPANY,
Defendants, Third Party Plaintiffs, and Petitioners,

vs.

UNITED STATES OF AMERICA,
Third Party Defendant, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether defendants with no contractual relation to the government may bring a third party indemnity action against the United States Government under the Federal Tort Claims Act where injuries to a serviceman who filed the original action were proximately caused by the negligence of the United States Government.

LIST OF PARTIES IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Tommy Oliver Lee
Plaintiff

Edward D. Becker
Defendant, third-party plaintiff

Carretta Trucking Co.
Defendant, third-party plaintiff

United States of America
Third-party defendants

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CITATION TO THE OPINIONS BELOW

As this petition arises from an interlocutory appeal of an order dismissing the third party defendant, there were no reported opinions delivered below. The Order of the United States District Court for the Middle District of Tennessee dismissing the third party defendant and certifying the question for appeal and the Order of the United States Court of Appeals for the Sixth Circuit denying a petition for permission to appeal are included in the appendix to this petition.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Sixth Circuit denying permission to appeal was entered January 19, 1984. This petition for certiorari was filed within ninety (90) days of the entry of that judgment. Jurisdiction of this Court is invoked under 28 USC §1254 (1) and Supreme Court Rule 17.1(c).

RELEVANT STATUTES

5 USC §8116:

(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

28 USC §2674:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 USC §2680:

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

STATEMENT OF THE CASE

On June 27, 1982, Edward Becker was driving his truck in a westerly direction along I-65 near its intersection with I-40W near Nashville. Becker attempted to change lanes and continue on I-40W when the vehicle struck and injured Tommy Oliver Lee. Lee, a member of the Tennessee Army National Guard, which as of that date was federalized and operating as an active component of the United States Army, was acting as a road guard for his unit during its convoy maneuvers. Lee was ordered to stand on the road in an area between I-65 and I-40W to direct the convoy.

Lee filed a complaint against Becker and Carretta Trucking, in Tennessee State Court for $750,000.00 in compensatory and $500,000.00 in punitive damages alleging that the proximate cause of his injuries was the negligence of the defendants. The defendants removed the case to the Federal District Court for the Middle District of Tennessee based upon diversity of citizenship and filed a third-party complaint under the Federal Tort Claims

Act, 28 USC Subsections 2671, et seq. and Section 1346(b), alleging that the proximate cause of Lee's injuries was the negligence of the Tennessee Army National Guard operating under the direction of the United States, which positioned Lee as a road guard. The operation of the truck had no contractual connection with the United States Government. The defendants sought indemnity from the government for all sums that might be adjudged against them in favor of Lee.

United States of America moved to dismiss the third-party complaint for lack of subject matter jurisdiction, or in the alternative for summary judgment. On August 2, 1983, the District Court entered an order granting the government's motion to dismiss, but certifying the order as appealable.

Becker and Carretta Trucking filed a petition for permission to appeal the interlocutory order with the United States Court of Appeals for the Sixth Circuit. The Court of Appeals denied permission to appeal on January 19, 1984.

REASONS FOR ALLOWING THE WRIT

The issue of whether a civilian may bring a third-party complaint against the United States Government under the Federal Tort Claims Act when the civilian is sued by a soldier for injuries incurred while on duty is an important question of federal law which has not been, but should be, settled by this Court. This Court previously has barred third party indemnity actions by suppliers of military ordnance where concerns arose over the distinctly federal nature of their relationship to the government and adverse effects on military discipline. This Court has not addressed actions brought by an independent

civilian against the United States Government. This is an important issue of law which is fundamental to the further conduct of the case at the District Court level, and interlocutory status should not preclude review. *Michael v. United States,* ..... U.S. ....., 102 S.Ct. 489 (1981).

The presence of the United States is necessary to determine the responsibility of everyone involved in the accident. If the order is allowed to stand and the case brought to trial without the United States Government participating as a party, a future appeal on this issue by either Lee or Becker and Carretta could result in the necessity of retrying the entire case. The question of the negligence of the United States Government is the essential issue in this case. A savings of time and expense for the Court and the parties would result from resolving this issue before trial.

Federal Tort Claims Act

This suit was brought under the Federal Tort Claims Act. 28 USC §2671, et seq. The Federal Tort Claims Act is designed to do away with the sovereign immunity of the United States except under circumstances which are listed as specific exceptions to the broad waiver of immunity. 28 USC §2674, in part, states as follows:

> "United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

28 USC §2680 then outlines the exceptions, which are currently fourteen in number.

The exception relating to the military explicitly excludes only, "any claim arising out of the combatant activities in the military or naval forces, or coast guard, during time of war." 28 USC 2680(j).

Beginning with *Feres v. United States,* 340 U.S. 135 (1950), this Court limited the liability of claims under the FTCA brought in connection with military personnel. The factors prohibiting tort claims against the government where the injured is a member of the military have been modified to the point where three distinct policy considerations have developed which must be weighed before allowing such claims. Where threats to these policies do not exist, neither the statute nor the case law bars such actions.

Policy Considerations

In the case law three considerations have arisen to justify barring suits by military personnel and suppliers of military ordnance: The distinctly federal relationship of the United States Government to its soliders and suppliers of military ordnance, the existence of the Veterans Benefits Act, and the effect of allowing such claims on military discipline. None of these policies are compromised by allowing independent civilians to bring third party actions. If these three considerations are not threatened the action should be allowed in keeping with the intended broad waiver of immunity contemplated by the FTCA.

In *Feres* this Court ruled that the relationship between servicemen and the United States was distinctly federal in nature and should not be subject to local tort laws. This Court extended the rationale to some third party actions in *Stencel Aero Eng. Corp. v. United States,* 431 U.S. 666 (1976), where it was held the relationship between the United States and suppliers of ordnance was no less federal in character than the relationship between the government and soldiers. The government has successfully argued in these situations as well that their liability should not be subject to the vagaries of local tort law.

Neither Becker nor Carretta were suppliers of ordnance to the United States. The limitation of FTCA actions caused by a federal relationship have not and should not bar their action. The federal concern of applying local tort law to service related accidents where a corporation and a civilian are both totally unrelated to the functions of the military, is not only inconsistent with the language of the Federal Tort Claims Act but ignores the realities of an accident involving the military and civilian. The federal relationship argument supports the contention that the fortuity of where a solider is based should not control the liability of the United States Government when the soldier brings the suit. It can even be applied where a government contractor is involved. However, it makes little sense when civilians are involved. As noted by this Court several times, the military is everywhere on the continent, and abroad. The military will unfortunately, but inevitably, be involved in accidents with civilians. No law could possibly apply other than local law. References to the Federal Tort Claims Act also point back to local law. See 28 USC §2674.

Although a "federal relationship" argument supported the dismissal of a third party action in *Stencel* the Court has not extended the federal relationship argument beyond suppliers of ordnance. The *Stencel* case involved a National Guard pilot injured when his Egress Life Support System failed. He sued the manufacturer and the manufacturer filed a third party action against the United States. In affirming the dismissal of the third party action the Court relied on several theories. First, and apparently most importantly, this Court cited the *Feres* case for the proposition of the distinctly federal relationship between the government and its soldiers. In *Stencel* the Egress System was manufactured by Stencel Aero Engineering Corp. as a subcontractor pursuant to a contract with the United States.

This Court noted it had no problem in finding a distinctly federal relationship between the United States and Stencel Aero Engineering Corp. because Stencel was operating by virtue of a contract with the United States to supply ordnance.

> Since the relationship of the United States and petitioner is based on a commercial contract, there is no basis for a claim of unfairness in this result.
>
> Footnote 8. Since the first Circuit to hold such action barred by *Feres* was decided in 1964, See n.6, *supra*, petitioner no doubt had sufficient notice so as to take this risk into account in negotiating its contract for the emergency eject system at issue here.
>
> *Stencel*, at 674.

Government contractors could increase their prices to offset nonindemnifiable claims made by servicemen using their products.

Neither Becker nor Carretta had any such direct or indirect contractual connections with the government. There was no opportunity for business planning to offset such accidents. The truck was not on any business contracted for by the United States Government and therefore the basic factor found in *Stencel* does not apply. There is no relationship between Carretta or Becker and the United States Government contractual, or otherwise. Therefore, there is no distinct federal relationship. With this as the standard, one can imply, using the language of the *Stencel* case, that unfairness would, and does, result in the situation faced by Carretta and Becker.

Employees of the Federal Government are present throughout the county in civilian as well as military capacities. Recently, this Court has interpreted the similar lan-

guage that the Federal Employee Compensation Act to make the United States Government subject to liability in third party actions under local law. *Lockheed Aircraft Corp. v. United States,* ..... U.S. ....., 103 S.Ct. 1033 (1983). The military framework alone does not justify a distinction between *Lockheed* and the case at bar under the federal relationship analysis.

The second factor raised initially in the *Feres* case and carried through *Stencel* is the existence of the Veterans Benefits Act. The availability of the VBA to *Feres* argued strongly against allowing his claim under the FTCA. Although this Court found the existence of the VBA to merit some consideration as an upper limit of liability for the government in a third party situation, the majority in *Stencel* noted that it was difficult to apply in a third party situation. *Stencel,* at 672.

The difficulty is easy to discern. Obviously a party in the position of Carretta in this case, or Stencel, does not have the availability of the Veterans Benefit Act. That avenue of relief is open only to Lee. Making a fund which is not even available to Becker or Carretta an upper limit on their actions is illogical and not in keeping with the broad waiver of sovereign immunity intended by the FTCA. The dissent in *Stencel* further points out some of the serious problems with this rationale:

> The Court also concludes that compensation payments to an injured serviceman under the Veterans Benefits Act, 38 USC §321 et seq., place an absolute upper limit on the government's liability for service connected injuries. Yet nothing in that act suggests that it is designed to place on third parties, such as the petitioner, the burden of fully compensating injuries to servicemen when the government is at fault. Indeed, the Veterans Benefit Act does not even contain

> an explicit declaration that it is the exclusive remedy against the government for a serviceman's injury. The comparable compensation program for civilian employees of the Government does contain such a limitation of liability. USC §116(c).* Yet we have held that the broad language of the exclusivity provision in the civilian compensation act scheme does not affect "the rights of unrelated third parties," *Weyerhaeuser S. Co. v. United States*, 372 US 97, 601 (1963), and the lower courts have allowed indemnity suits identical to the petitioner's to proceed despite that provision.
>
> *Stencel*, at 676.

The Court relied on this reasoning to interpret the exclusive remedy language of the Federal Employee Compensation Act, USC §8116(c) at issue in *Lockheed*, as allowing a third party to bring an indemnity action against the United States under the Federal Tort Claims Act.

In *Lockheed* this Court noted the FECA "was intended to govern only the rights of employees, their relatives, and people claiming through or on behalf of them." These are the only categories or parties who benefit from the "quid pro quo" compromise that the FECA adopts. *Id.*, at 1033.

The statute at issue in *Lockheed* is the civilian counterpart of the VBA, but it contains one important distinction. The Federal Employees Compensation Act contains a clause ruling it to be the exclusive remedy available to injured employees, and the Veterans Benefits Act does not. 5 USC §8116(c). Hence, if third party actions are allowed under the stricter language of the FECA, surely such litigation is not precluded by the existence of the VBA.

The final, and according to the recent language of this Court, most important policy to be considered is the

effect on military discipline of allowing such claims where military personnel are involved. *Chappell v. Wallace*, ... U.S. ....., 103 S.Ct. 2362 (1983).

This case does not involve a soldier questioning the orders of a superior. It does not even involve someone contractually connected with the military intruding into the chain of command. Becker and Carretta are private citizens for the purposes of this suit with interests adverse to Lee and United States Government. Concerns over the erosion of military discipline arise only where there is a suit brought directly by a soldier questioning the orders of a superior or where the soldier acts in collusion with the defendant to bring the government into a case indirectly.

Because the military operates by orders through a chain of command, even where the injured party is a civilian, the injured party necessarily would question the military orders leading to the cause of the injuries. A questioning of those orders is necessary in every suit against the military because of the very manner in which the military operates. Unless the military is to be made wholly immune from suit by outside parties, the effects on military discipline caused by civilians questioning orders are inadequate to deny this type of action.

As pointed out by the dissent in *Stencel*, if the malfunction of the pilot eject system which caused the serviceman's injuries in that case also caused that system to plunge into a civilian's house, the injured civilian would unquestionably have a cause of action under the Federal Tort Claims Act against the government. In such an instance he might sue the manufacturer which might crossclaim against the government, and the trial would involve testimony pitting one officer against another and involve the second guessing of military orders. *Stencel*,

at 676. Similarly, if Becker had swerved and missed Lee and been injured in so doing, Becker could certainly have brought a negligence action against the United States for his own injuries. Such suits would clearly be allowable or the entire purpose of the Federal Tort Claims Act would be abrogated.

Activities by the military which result in tortious injuries are cause for civil suit. The countervailing concerns of military discipline can be accommodated by distinguishing between the questioning of command by a subordinate and the questioning of a negligent act of the military by someone outside the military. Discipline and obedience may justify barring the former suit, but they are poor excuses for excluding the latter.

The Federal Tort Claims Act has been read expansively and this Court should construe narrowly those exceptions necessary to preserve the discipline of the military. This third party action poses no threat to that authority. The harsh results of requiring Becker and Carretta to defend this action without the presence of the United States Government warrants the granting of certiorari to determine if the parameters of discipline necessarily extend this far.

The basic inequity of dismissing this action confronts the original purposes of establishing the Federal Tort Claims Act. "It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." *Feres*, at 139. The unfairness not present in *Stencel, Id.*, at 674, is compelling here. There was no commercial contract or even a relationship between Becker and Carretta and the United States Government. To apply the rules blindly without examining the purposes behind them, or the relationship of this set of facts to those purposes ignores basic tenets of fairness and justice.

CONCLUSION

The Supreme Court has not addressed the specific issue of independent civilians seeking indemnity under the FTCA where military personnel were injured. The policies set forth by *Stencel* do not apply and the FTCA does not exclude an action such as this. The rulings of the Courts below have given rise to a case of first impression before this Court, making the granting of certiorari on interlocutory appeal appropriate.

For these reasons, a Writ of Certiorari should issue to review the dismissal of the request for permission to appeal by the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

(Filed January 19, 1984)

No. 83-8553

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TOMMY OLIVER LEE,
Plaintiff,

v.

CARRETTA TRUCKING COMPANY
and EDWARD BECKER,
Defendants and Third-Party Plaintiffs,

v.

UNITED STATES OF AMERICA,
Third-Party Defendants.

ORDER

BEFORE: ENGEL, MARTIN, and JONES, Circuit Judges

This case is before this Court on the application of the defendants/third-party plaintiffs for leave to take an interlocutory appeal under 28 U.S.C. §1292(b) from the order of the district court dismissing their third-party complaint against the United States. The district court certified its order under 28 U.S.C. §1292(b) as presenting a controlling question of law as to which there are substantial grounds for differences of opinion, the immediate appeal of which would materially advance the termination of the litigation.

This Court has reviewed the petition and the response thereto and has concluded that there is no substantial ground for difference of opinion such as to warrant an interlocutory appeal.

It is therefore ORDERED that the petition for permission to appeal be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

Docket No. 82-3675

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

TOMMY OLIVER LEE,
Plaintiff,

vs.

CARRETTA TRUCKING COMPANY and
EDWARD BECKER,
Defendants and Third Party Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Third Party Defendants.

ORDER

The Court hereby grants the motion of the third party defendant to dismiss the third party complaint for lack of subject matter jurisdiction. The Court is of the opinion, for purposes of 28 U.S.C. §1292, that an immediate appeal from this ORDER may materially advance this litigation as the ORDER involves a controlling question of law as to which there is substantial ground for difference of opinion. The Court also ORDERS that the Stay of Discovery previously ORDERED pending disposition of this motion to dismiss is hereby lifted.

Entered this the 2nd day of August, 1983.

/s/ JOHN T. NIXON
United States District Judge

Docket No. 82-3675

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

TOMMY OLIVER LEE,
Plaintiff,

vs.

CARRETTA TRUCKING COMPANY and
EDWARD BECKER,
Defendants and Third Party Plaintiffs,

UNITED STATES OF AMERICA,
Third Party Defendant.

Memorandum

Pending in this personal injury action, which was removed to this Court as subject to diversity jurisdiction, 28 U.S.C. §1332, is the motion of the third party defendant, the United States of America, to dismiss the third party complaint pursuant to FED. R. CIV. P. 12(b) for lack of subject matter jurisdiction. The Government also moves, in the alternative, for summary judgment pursuant to FED. R. CIV. P. 56. For the reasons that follow, the third party defendant's motion to dismiss will be granted.

The Government and the third party plaintiffs, Edward D. Becker and Carretta Trucking Company, have stipulated for purposes of this motion to the following set of material facts. On June 27, 1982, Tommy Oliver Lee, a member of the Tennessee Army National Guard, which as of that date was federalized and operating as an active component of the United States Army, was performing military duties as a road guard for his unit during its convoy maneuvers.

Lee was ordered to stand in an area between I65 and I40 W where he was struck and injured by a truck driven by Becker. Lee filed a complaint against Becker and his agency, Carretta Trucking, in Tennessee state court alleging that the proximate cause of his injuries was the negligence of the defendants. The defendants thereafter removed the case and filed the subject third party complaint under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§2671, *et seq.* and §1346(b), alleging that the proximate cause of Lee's injuries was the negligence of the Tennessee Army National Guard, operating under the direction of the United States, which positioned Lee as a road guard. The third party plaintiffs note in addition that at the time the truck was being driven, it was not engaged in any business with the United States Government. They seek indemnity from the Government for all sums that may be adjudged against them in favor of Lee.

The Government argues that the third party complaint must be dismissed because the Federal Tort Claims Act does not waive the sovereign immunity of the United States under the circumstances of this case. Relying on *Feres v. United States*, 340 U.S. 135 (1950), and its progeny, the Government maintains that the United States may not be sued for damages arising from injury or death incident to military service either directly by the serviceman or indirectly by third parties seeking indemnity. In response, the third party plaintiffs urge this Court to construe recent Supreme Court decisions so as to hold the *Feres* doctrine inapplicable to this case.

The FTCA "waives the Government's immunity from suit in sweeping language," *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951), providing that the United States shall be liable for "injury or death caused by negligent or wrongful act or omission of any employee of the

Government . . . under circumstances where the United States, if a private person, would be liable to the claimant. . . ." 28 U.S.C. §1346(b). However, this waiver has both statutory and judicially-established exceptions, including that recognized in *Feres*. As stated by the unanimous Court, this exception provides that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen *where the injuries arise out of or are in the course of activity incident to service*". 340 U.S. at 146 (emphasis added).

In *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), the Supreme Court "unequivocally reaffirmed *Feres* and expanded the scope of the doctrine." *Woodside v. United States*, 606 F.2d 134, 139 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980) (tracing development of *Feres* doctrine). The Court in *Stencel* "for essentially the same reasons that [a] direct action by [a service member] is barred by *Feres*," extended the Government's immunity to include suits by third parties seeking indemnity from the United States. *Stencel* 431 U.S. at 673.

As in the instant case, the plaintiff in *Stencel*, a member of the National Guard, suffered injuries incident to service when the life-support system of his aircraft malfunctioned. He filed an FTCA action against the manufacturer of the system and the United States. The manufacturer then brought suit against the United States for indemnity, alleging that any malfunction was due to the government's provision of faulty specifications and components.[1] Examining the rationale underlying *Feres*, the

---

1. No contractual relationship existed between Stencel and the Government; Stencel was subcontracted by a prime Government contractor to furnish the pilot eject system. *Id.* at 667-68 n.2.

Stencel Court held that the same considerations applied to bar the indemnity suit where the direct action was for service-connected injuries. First, as the *Feres* Court had observed, a suit against the United States by a service member is by nature federal rather than state. The FTCA, however, makes "the law of the place where the act or omission occurred" govern any resulting liability. 28 U.S.C. §1346(b). Because the relationship between the Government and members of its armed forces is "distinctly federal in character", the Court decided in *Feres* and *Stencel* that it made "no sense" to allow the Government's liability for service-connected injuries to be governed by local tort law. *Stencel*, 431 U.S. at 672; *Feres*, 340 U.S. at 143. Whether in the context of direct actions or indemnity suits, to permit "the situs of the alleged negligence to affect the liability of the Government" made "equally little sense." *Stencel*, 431 U.S. at 672.

The *Stencel* Court observed, second, that the Veterans Benefit Act, also pertinent to the instant case, serves two purposes: to provide generous, certain and efficient compensation for injured service members and to establish a maximum limit of governmental liability for service-connected injuries. To allow the third party's indemnity claims would, the Court reasoned, circumvent this limitation and thus frustrate Congress' intent in the Veterans Benefit Act. *Id.* at 672.

Finally, the *Stencel* Court, quoting *United States v. Brown*, 348 U.S. 110, 112 (1954), reaffirmed the following policy rationale for *Feres*:

> "[t]*he peculiar and special relationship of the solider to his superiors*, the effects of maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed

> for negligent orders given or negligent acts committed in the course of military duty."

Stencel, 431 U.S. at 673 (emphasis added). The Court concluded that it was

> "quite clear that where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party."

Id. at 673.

The third party plaintiffs argue that *Stencel* does not bar the instant indemnity claim because *Stencel* applies only when the third party is a "supplier of ordnance," such as the sub-contractor in that case, or has at least some commercial relationship with the Government. This argument does not stand up to inspection. It is based upon the third party plaintiffs' unwarranted reading of *Stencel* as holding that the "distinctly federal" relationship between the United States and its suppliers of ordnance is the determinative factor for application of the *Feres* doctrine, whereas the other considerations expressed by the Court were merely "additional factors" of little consequence here.

To the contrary, the Supreme Court itself has indicated, subsequent to its decision in *Stencel*, that if any factor should be singled out for emphasis in determining whether *Feres* applies it is the third factor regarding military discipline, not the first consideration relied upon by the third party plaintiffs. In its recent decision in *Chappell v. Wallace*, 51 U.S.L.W. 4733 (U.S. June 14, 1983), holding that enlisted military personnel could not maintain damage suits against superior officers for alleged unconstitutional racial discrimination, the Court again summarized the *Feres* doctrine stating:

> As the Court has since [the decision in *Feres*] recognized, "[i]n the last analysis, *Feres* seems *best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects on the maintenance of such suits on discipline'*".
>
> * * *
>
> [C]enturies of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.
>
> * * *
>
> . . . Here, as in *Feres*, we must be "concern[ed] with the disruption of '[t]he peculiar and special relationship of the soldier to his superior' that might result if the soldier were allowed to hale his superiors into court' ", *Stencel Aero Engineering Corp. v. United States, supra*. . . .

Id. at 4734-4736 (citations omitted). *Accord United States v. Muniz*, 374 U.S. 150, 162 (1963).

Several lower courts have also construed *Feres* and *Stencel* as emphasizing the military discipline consideration. For example, in the case of *Hunt v. United States*, 636 F.2d 580 (D.C. Cir. 1980), although because of the unique liability scheme of the Swine Flu Act, the *Feres* doctrine did not apply to bar recovery from the United States, the District of Columbia Circuit explained the *Feres* doctrine, citing *Stencel*:

> At bottom, it is the third factor articulated by the Supreme Court, the protection of military discipline, that serves largely if not exclusively as the predicate for the *Feres* doctrine. Although the Court has woven a tangled web in its discussion of the "distinctly federal" notion and of the alternative compensation system, it has not wavered on the importance of maintaining discipline within the armed-forces. The Court has found it unseemly to have military personnel, injured incident to their service, asserting claims that question the propriety of decisions of conduct by fellow members of the military. Only this factor can truly explain the *Feres* doctrine and the crucial line it draws on the basis of whether an injury arose "incident to service."

Id. at 599 (citations omitted). *Accord Lombard v. United States*, 690 F.2d 215, 219 n 7 (D.C. Cir. 1982); *Everett v. United States*, 492 F. Supp. 318, 321 (S.D. Ohio 1980); *Howell v. United States*, 489 F. Supp. 147, 148 (W.D. Tenn. 1980).

In addition, several courts have concluded, based on the Supreme Court's recent decisions, that although not all of the *Feres* considerations may be present in a particular case, that fact does not mean that *Feres* is inapplicable. *Carter v. City of Cheyenne*, 649 F.2d 827, 830 (10th Cir. 1981); *Uptegrove v. United States*, 600 F.2d 1248, 1250 (9th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980). These Courts have held that the controlling determination, regardless of who brings suit against the Government, is whether the claim involves service-connected injuries. The Court in *Carter v. City of Cheyenne* held that the *Feres* doctrine barred a third party indemnity action because the claim related to an air force pilot's service-related injuries and the status of the injured person was the controlling question, not the status of the third party:

Indeed, in *Hatzlachh Supply Co., Inc. v. United States*, 444 U.S. 460, 100 S.Ct. 647, 650, 62 L.Ed.2d 614 (1980), the Court mentioned that *Stencel* had recognized:

"* * * that the Veterans' Benefits Act provided compensation to injured serviceman, which we understood Congress intended to be the *sole remedy for service connected injuries* [*and, therefore*] *we declined to construe the Tort Claims Act to permit third party indemnity* suits that in effect would expose the Government to ..... of liability than that contemplated under the statutory compensation scheme. In *Stencel*, Congress had provided a remedy which we thought to be exclusive . . . ."

From consideration of *Hatzlachh*, it is to be concluded that where the Veterans Benefit Act is present, as it is in our case, it is the sole or *exclusive remedy for claims which involve service related injuries, irrespective of who sues the United States. Thus then, in a Veterans Benefit Act case, growing out of a service connected injury, there cannot be a recovery of indemnity for payments to the serviceman who suffered the injury.* *Hatzlachh* applied the single test whether the injury to the serviceman was service connected.

Carter v. City of Cheyenne, 649 F.2d at 830 (emphasis supplied).

On the basis of the foregoing authorities, the argument of the third party plaintiffs must be rejected. There is no dispute that Lee is a serviceman injured incident to military duty and that the instant indemnity claim relates to Lee's service-connected injuries. Under *Hatzlachh* and its interpretation of *Stencel*, therefore, defendants Becker and Carretta Trucking cannot maintain a third party action for recovery against the United States based upon those in-

juries. Further, giving heed to the *Chappell* Court's emphasis upon military discipline as the rationale underlying the *Feres* doctrine, application of *Feres* is entirely appropriate in this case. It is undisputed that Lee was following the order of his commanding officer in standing at the location where the accident occurred. To allow maintenance of the indemnity claim for allegedly negligent orders given in this case, therefore, would be to permit precisely that disruption of the "peculiar and special relationship of the soldier to his superiors" against which the Supreme Court has warned. *Stencel*, 431 U.S. at 673.

Moreover, even apart from these considerations, this Court would not be persuaded by the third party plaintiffs' contention that had there been no "distinctly federal" relationship between the third party supplier of ordnance and the Government, the *Stencel* Court would not have applied *Feres*. The Court's "distinctly federal" language, vague as it is, should not be divorced from its original context. The Court's concern in *Feres* was that the Federal Tort Claims Act makes the law of the situs of the tort govern; in suits between parties whose relationship is so peculiarly federal, it seemed anomalous that any resulting liability should rest on the fortuity of the provisions of the local law applicable at that situs. *See Stencel*, 431 U.S. at 671. This anomaly persists in indemnity suits involving a service member's service-related injuries regardless of the status of the party seeking indemnity, as the situs of the underlying tort claim must still dictate what law governs. The existence of an additional "federal relationship" between the Government and its supplier in *Stencel* may have heightened the Court's sensitivity to this problem; however, this Court is not persuaded that its existence was necessary to the outcome.

Finally, the defendants argue in light of the Supreme Court's recent decision in *Lockheed Aircraft Corp. v.*

United States, ... U.S. ....., 103 S.Ct. 1033 (1983), which held that FECA's exclusive liability provision, 5 U.S.C. §8116(c),[2] does not directly bar a third party indemnity action against the United States, that *Stencel* "is outside the mainstream of thought allowing recovery under the Federal Tort Claims Act" and should not be applied in this case. Defendant's Brief in Opposition to Motion for Summary Judgment at 12. Defendants disregard, however, the critical distinctions the *Lockheed* Court itself drew between the two cases.

First, *Lockheed* involved an indemnity claim based on the fatal injury of a *civilian* federal employee, not a serviceman or servicewoman, and second, the validity of a substantive right to indemnity, at issue in *Stencel*, was not before the *Lockheed* Court because the Government's sole challenge to the indemnity claim was that it was subject to the FECA's exclusive liability provision, 5 U.S.C. §8116(c). Concluding that *Stencel* offered "no support" to the Government's exclusive liability argument the Court explained:

> The validity of Lockheed's underlying substantive claim is not before us.
>
> * * *
>
> The issue in *Stencel*, again relating to the underlying substantive claim, was whether the Government's waiver of sovereign immunity in the Federal Tort

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2. The FECA's exclusive liability provision states, in relevant part:

> The liability of the United States . . . with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States . . . to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States . . . because of the injury of death. . . .

> Claims Act applied to an *indemnity action based on an injury to a serviceman.* Relying primarily on the military nature of the action, we held that the doctrine of *Feres v. United States, 340 U.S. 135 (1950), precluded the substantive claim without regard to any exclusive liability provision.*

Lockheed, 103 S.Ct. at 1037 n. 8 (emphasis supplied). Certainly, as defendants argue, *Stencel* is limited to its particular set of facts; however, the critical facts concern the service-related injury and not the status of the third party. The instant case, unlike *Lockheed,* invoives a service-connected injury to a serviceman and a challenge by the Government to the validity of the underlying, substantive indemnity claim under the *Feres* doctrine. It is clear, therefore, that *Stencel* and not *Lockheed* is the controlling decision in this case.

This Court, accordingly, concludes that despite the absence of a contractual or any other relationship between the third party plaintiffs and the Government, their indemnity claim is barred under the *Feres* doctrine because it involves a serviceman's service-related injuries. *Accord Carter v. City of Cheyenne,* 649 F.2d at 831; *Ionian Glow Marine, Inc. v. United States,* 670 F.2d 462, 463 (4th Cir. 1982), *cert. denied,* 103 S.Ct. 1271 (1983) ("It is . . . beyond question that if this present suit were in the form of an indemnity suit under the FTCA it would be barred"); *Henry v. Textron, Inc.,* 577 F.2d 1163 (4th Cir.), *cert. denied,* 439 U.S. 1047 (1978) (indemnity action clearly foreclosed under *Stencel* despite hardship on third party). *See also Lombard v. United States,* 690 F.2d at 223 ("*Feres* bars recovery by family members where the cause of action is ancillary or derivative to the serviceman's action for his own injury received incident to military service"); *Monaco v. United States,* 661 F.2d 129, 133 (9th Cir. 1981),

cert. denied, 102 S.Ct. 2269 (1982) (dismissing claims for genetic injury to child resulting from parent's service-connected injuries); *Woodside v. United States*, 606 F.2d at 139-142 (wrongful death action by serviceman's widow barred under *Feres* and *Stencel*); *Everett v. United States*, 492 F. Supp. at 322 n. 1 (surviving spouse's derivative claims for loss of consortium also barred).

This Court recognizes, as have all those courts holding that such actions by third persons are precluded, that it is Lee and not Becker or Carretta Trucking who may seek compensation under the Veterans Benefit Act. However, this Court agrees with the Tenth Circuit in *Carter v. City of Cheyenne*, 649 F.2d at 831 that

> "the fact that [the defendants are] not allowed to implead the United States in this action and render the United States liable for damages which exceed those provided in the Veterans Benefit Act does not, of course, preclude [the defendants] from arguing at the trial of the present action that the negligence of the United States rather than the negligence of the City of Cheyenne was the cause of [plaintiff's injury]. . . . [The defendants] will only be liable for [their] own negligence, if any, and not for any negligence on the part of the United States.

In conclusion, this Court holds that the third party claim in this case is barred by *Feres, Stencil, Hatzlachh,* and *Chappell*. As sovereign, the United States "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Because the Court has concluded that under the *Feres* doctrine the United States has not waived sovereign immunity for suits brought

for indemnification by third parties in regard to a service member's "service-connected injuries", this Court is without jurisdiction. Accordingly, the third party defendant's motion to dismiss will be granted. In addition, this Court is of the opinion for purposes of 28 U.S.C. §1292, that an immediate appeal from the contemporaneously filed ORDER may materially advance this litigation as it involves a controlling question of law as to which there is substantial ground for difference of opinion. Finally, the Court will ORDER that the stay of discovery that was previously ORDERED pending disposition of the third party defendant's motion shall be lifted as of entry of this memorandum and ORDER.

This the 2nd day of August, 1983.

/s/ JOHN T. NIXON
United States District Judge

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